

Nguyen (Migration) [2021] AATA 2559 (27 May 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Van Le Nguyen
VISA APPLICANTS:	Mrs Thi Ngoan Vuong Master Duc Trung Nguyen Miss Thi Cam Nhung Nguyen
CASE NUMBER:	1806771
DIBP REFERENCE(S):	BCC2016/3300383
MEMBER:	Hugh Sanderson
DATE:	27 May 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211 of Schedule 2 to the Regulations; and • cl.309.221 of Schedule 2 to the Regulations.

Statement made on 27 May 2021 at 8:36am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine spousal relationship – financial aspects – nature of household – social aspects – commitment to each other – errors in initial visa application – decision under review remitted
1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 23 February 2018 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
3. The first named visa applicant (the visa applicant) applied for the visa on 5 October 2016 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because the delegate was not satisfied the visa applicant was the spouse, as defined in s.5F of the Act, of the review applicant.

Background

5. The review applicant was born in Vietnam and is currently 58 years old. He first arrived in Australia 1978. He is an Australian citizen. His parents are deceased. He has two brothers who continue to live in Vietnam and two brothers who live in Australia.
6. The review applicant has previously been married on two occasions. He married his first wife in 1984 and divorced her in August 2010. There are two children from that relationship, Bill who is currently 37 years old and Belinda who is currently 30 years old. He then married Thi Bich Nhu Tran in September 2010 and sponsored her for a Partner visa. That application was refused by the Department. The applicant sought a review of that decision before the Tribunal, however, withdrew that application in March 2012 after having returned from Vietnam that month. He did not travel to Vietnam again until 2015. He divorced Ms Tran in May 2015.
7. The visa applicant is a citizen of Vietnam and is currently 48 years old. She was previously married and divorced her husband on 23 July 2015. There are two children of that relationship who are the second named visa applicants. They are currently aged 19 and 16 years old. Her parents, six sisters and a brother live in Vietnam.
8. The parties claimed they first met each other in Vietnam on 28 February 2015 in Saigon at a friend's party. They claimed that the relationship developed between each other as they had both separated from their spouses. The review applicant returned to Vietnam in October 2015 and travelled to Cat Ba in the north of Vietnam where the visa applicant lives. It was claimed they spent time with each other and travelled with the visa applicant's children. The review applicant returned to Vietnam again in June 2016 when they declared their relationship to their friends and family. They were married on 17 June 2016. They claimed that their families, relatives and many friends attended the wedding.
9. Since first meeting each other, the review applicant has travelled overseas as follows:
 - From 22 February 2015 to 8 March 2015;
 - From 8 October 2015 to 21 October 2015;

- From 1 February 2016 to 26 February 2016;
 - From 28 April 2016 to 13 May 2016;
 - From 3 June 2016 to 16 July 2016;
 - From 21 January 2017 to 16 February 2017;
 - 5 February 2018 to 21 February 2018;
 - 20 February 2019 to 7 March 2019; and
 - 4 January 2020 to 21 January 2020.
10. The parties provided various documents in support of the application including statements from friends. The parties were interviewed by an officer from the Department.
11. The Department noted the review applicant had failed to provide information as to his first marriage and the children of that marriage when the application was made. The Department noted the applicant had failed to disclose that he had sponsored his second wife for a Partner visa. The review applicant responded by claiming that he had provided this information to his migration agent, however, she had not included that in the information she prepared for the application. It was claimed this migration agent's employment had been terminated by her employer.
12. The delegate who considered the application noted the following:
- There was little information as to any financial aspects of the relationship;
 - Evidence had been provided of temporary registration and hotel receipts indicating the parties had spent time together, however, there was little to indicate the establishment of any household;
 - The parties provided photos of themselves together in Vietnam and evidence they had participated in various activities together;
 - The photos of the parties wedding were captioned as if both the visa applicant's and review applicant's parents were attending the wedding, however, the review applicant's parents were deceased at the time of the wedding;
 - When questioned about this inconsistency, the visa applicant claimed that the people identified as the review applicant's parents were "representing" his parents;
 - None of the review applicant's family, including those who live in Vietnam, attended his wedding, with the visa applicant claiming they had to attend a relatives' funeral, but was not able to provide any details of whose funeral it was;
 - There was limited information as to any continuing social activities of the parties;
 - There were discrepancies in the claims made as to the inception and development of the relationship, including whether they first met in February 2015 at a friend's place or in October 2015 at the airport with the visa applicant claiming that as it was a long time ago she could not remember;

- Photos were provided showing the parties together purportedly taken on 12 March 2015 and 13 March 2015 when the Department's records showed the review applicant had returned to Australia on 8 March 2015; and
 - There was little information to indicate the parties had any long-term commitment to the relationship.
13. Taking these matters into account, the delegate was not satisfied that the parties were in a genuine and continuing relationship. The delegate found that the visa applicant was not the spouse, as defined in s.5F of the Act, of the sponsoring partner and did not meet the criteria in cl.309.211(2) and refused the application.
14. As the visa applicant did not meet the criteria for the grant of the visa, the delegate found the second named applicants were not members of the family unit of a person who met the primary criteria and therefore their applications were also refused.

Information to the Tribunal

15. The review applicant provided further documents to the Tribunal including the following:
- Chat records of the parties;
 - Evidence of the parties with the visa applicant's daughter travelling to Thailand;
 - Evidence of money being sent by the review applicant to the visa applicant; and
 - Photos of the parties together in Vietnam including at various family functions.
16. The review applicant appeared before the Tribunal by MS Teams on 26 May 2021 to give evidence and present arguments. The Tribunal also received oral evidence from the review applicant's landlady who is a friend of the visa applicant and the visa applicant. The review applicant was represented in relation to the review by his representative who attended the hearing.
17. The parties gave consistent information as to various aspects of their relationship. This included details of where they were living, the financial support the visa applicant has received from the review applicant, details of their children's lives, and their plans for their future together in Australia. Information was provided as to how the parties were first introduced and the development of their relationship.
18. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

19. The issue in the present case is whether the visa applicant is the spouse, as defined in s.5F of the Act, of the review applicant.

Whether the parties are in a spouse or de facto relationship

20. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.

21. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

22. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married in Vietnam on 8 October 2015. There is nothing to indicate that the marriage between the parties is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects

23. The parties are living in separate countries and it is, therefore, not surprising that they do not jointly own any property or have any joint liabilities. The review applicant does not own any significant assets in Australia. The visa applicant owns the property in which she lives and plans to sell this property and use its proceeds to invest in a home in Australia if she is granted the visa. The review applicant works and has been sending money to provide some financial support to the visa applicant and her children. The amount he is sending is consistent with the evidence he provided as to his income.
24. Although there is limited information as to the financial aspects of the relationship, the fact that the parties live in separate countries means that only little weight can be placed on this aspect when considering the parties relationship. The information that has been provided does, however, support a finding that the parties intend to live together in a genuine and continuing relationship and that they have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Household

25. Again, as the parties live in separate countries, there is only limited information of the establishment of any household together. The review applicant has travelled to Vietnam on eight occasions since first meeting the visa applicant in 2015. On these occasions, he has spent time with the visa applicant in her home or travelling with her and either one or both her children. The Tribunal accepts that when in Vietnam the review applicant has treated the children of the visa applicant as his own and was involved in their care.
26. Although the nature of their life together in Vietnam was only limited, the time the review applicant has spent with the visa applicant and her children in Vietnam and travelling together has given the parties an opportunity to experience living with each other in a normal domestic situation. This supports a finding that the parties intend to live together in a genuine and continuing relationship have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Social aspects

27. The parties provided statements from their friends attesting to the fact that they represent themselves to other people as being married and that their relationship is recognised and supported by their friends. There is limited information from the relatives of the review applicant as to the relationship. None of the relatives of the review applicant attended the wedding in there is limited information of any social recognition of the relationship by the family of the review applicant.
28. The review applicant's family who live in Vietnam live in the far south of the country. The visa applicant and her family live in the far north of the country. Evidence was provided that the visa applicant has met one of the review applicant's brothers who lives in Vietnam. Evidence was provided of the contact the visa applicant has had with the review applicant's children. As the review applicant's children do not speak Vietnamese, the visa applicant has had only limited interaction with them.
29. When the review applicant has travelled to Vietnam he has spent time with the visa applicant and her children, either staying with the visa applicant in her home in the north of Vietnam or travelling in Vietnam and to Thailand. Photos have been provided of the parties' activities in Vietnam and in Thailand.
30. Overall, the Tribunal is satisfied that the parties represent themselves as being married to each other and that their relationship is recognised and accepted by their friends and family. The Tribunal finds the parties have participated in various social activities and will continue to do so in the future. The Tribunal is satisfied the social aspects of the relationship supports a finding that the parties intend to live together and that their relationship is genuine and continuing and they have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Commitment to each other

31. The parties first met each other in February 2015. The review applicant returned to Vietnam in October 2015, February 2016 and April 2016 to spend time with the visa applicant and her children. The parties were married in June 2016. They have now been married for almost five years. The review applicant continued to travel regularly to Vietnam to spend time with the visa applicant and her children after they were married.
32. The parties provided evidence of their continued communication with each other. During the hearing, the parties provided consisted information as to different aspects of each other's lives, including the activities of their children. The Tribunal is satisfied that the parties provide each other the degree of companionship and emotional support which would be expected in a genuine relationship. They provided details of their plans for their future together, including the visa applicant selling her home in Vietnam to use the proceeds to help them buy a property together in Australia.
33. The Tribunal finds that the parties show the degree of commitment to each other which would be expected in a genuine and continuing relationship and one where the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Other issues

34. It is noted that in the initial application for the Partner visa there were a number of errors in the information provided in that application. This included stating that one of the sisters of the visa applicant was resident in Australia, that the review applicant did not have any children, and that the review applicant had not previously sponsored a person for a Partner

visa. There is no reason why the visa applicant would have stated that one of her siblings resided in Australia if this was incorrect. In the sponsorship form the review applicant's two previous marriages are disclosed in the fact that he has two children is also disclosed. His previous sponsorship of his second wife is not disclosed.

35. The Tribunal accepts that the failure to provide the correct information in the application was due to a failing of the parties' migration agent and not due to any intentional act of the visa applicant or the review applicant. It appears that other information provided at that time was not truthful. In particular, it appears that the manner in which the parties started their relationship was due to friends of the visa applicant living in Australia who were friends of the review applicant suggesting the match. It was for this reason that the review applicant travelled to Saigon and the visa applicant travelled down from the north of Vietnam to meet each other for the first time. The Tribunal accepts that although arranged by friends it was done on the basis that they believed that the parties would make a good match. The Tribunal accepts that since then their relationship has developed and, after spending time together in Vietnam, they decided to commit to a marriage relationship.
36. In considering all the evidence, the Tribunal is satisfied that the parties intend to live together in Australia. The Tribunal is satisfied that at the time of the application and at the time of this decision the parties were in and continue to be in a genuine and continuing relationship and have a mutual commitment to a shared life as husband and wife to the exclusion of all others.
37. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. Therefore, the visa applicant meets cl.309.211 and cl.309.221.
38. As the Tribunal is satisfied that the visa applicant meets these criteria for the grant of the visa, the applications of the second named visa applicants, as members of the family unit of the primary visa applicant, should now be reconsidered in full.
39. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

40. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).